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1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

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WRITER'S DIRECT NUMBER
(202) 736-8088

WRITER'S E-MAIL ADDRESS
dlawson@sidley.com

September 8, 2004

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Dortch:

The purpose of this letter, which Sprint, Level 3, MCI, and AT&T join, is to express these parties' strong opposition to a proposal by Verizon and BellSouth that the Commission resolve its ISP-bound traffic remand proceeding by ruling that ISP-bound traffic is beyond the scope of § 251(b)(5). As explained more fully below: (i) the construction of section 251(b)(5) advanced by Verizon and BellSouth in the Commission's ISP-bound traffic remand proceeding is entirely unworkable and would produce absurd results that could call into question the Commission's § 251(b)(5) authority over many types of *non*-ISP-bound traffic, (ii) narrowing the scope of § 251(b)(5) in this fashion as a short-term "fix" for ISP-bound traffic could therefore needlessly complicate efforts to adopt urgently-needed comprehensive intercarrier compensation reforms that have broad support within, and are essential to the future health of, the industry, and (iii) for these and other reasons, the Verizon/BellSouth approach would only invite yet another reversal by the court of appeals and is, accordingly, an inferior approach even when the ISP-bound traffic proceeding is considered in isolation.

In their July 20, 2004 "Supplemental White Paper," Verizon and BellSouth advance the theory that § 251(b)(5), which imposes a duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. § 251(b)(5), is wholly inapplicable to ISP-bound traffic, because a LEC that delivers calls to an ISP does not "terminate" any traffic. In their view, ISP-bound calls do not "terminate" at the ISP for purposes of § 251(b)(5), but rather "terminate" at the various websites that the ISP's customers visit (some of which may reside on servers beyond the ISP's premises). And, in their view, it is only these further communications to distant websites, and not the "call" that the LEC delivers to the phone number that is dialed, that are relevant to whether the LEC has engaged in "termination," as that term is used in § 251(b)(5).

As detailed below, that cramped construction of § 251(b)(5) runs counter to the statute, the Commission's own rules construing and implementing the statute, and, importantly, the commonsense understanding of the statute that the D.C. Circuit expressed in rejecting the same "no termination" theory of ISP-bound call delivery when the Commission last advanced it in 1999. *See Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000). Thus, as a means to bring certainty and final resolution to the issue of compensation for the delivery of ISP-bound traffic, the Verizon/BellSouth approach has little to recommend it. But it is important for the Commission to understand fully the broader implications of that approach.

Any ruling that calls are "terminated" within the scope of § 251(b)(5) only if there are no further communications beyond the premises associated with the called PSTN number could create numerous, indefensible gaps in the scope of § 251(b)(5). Accordingly, if the Commission were to endorse the Verizon/BellSouth argument that § 251(b)(5) does not apply to ISP-bound traffic because "telecommunications" continue to some destination beyond the called party's premises, the Commission could be stripped of § 251(b)(5) authority over a whole range of calls that are characterized by continuing telecommunications. Suppose, for example, that A makes a local call to B. B is not home, and the call is forwarded to the local voice mail server of the LEC that serves B. As in the context of ISP-bound traffic, "telecommunications" continues beyond B to a distant (but intrastate) server. Under Verizon's cramped view of the statute, however, the call from A to B is apparently outside the scope of § 251(b)(5) duties (and hence the Commission's otherwise broad § 251(b)(5) rulemaking authority). Substantial numbers of local and other intrastate calls are already routed to voice mail servers – and unified messaging services – in this fashion. And the emergence of VoIP "Do Not Disturb" and similar features that allow consumers dynamically to manage call inflow and routing can be expected exponentially to increase the volume of calls that trigger communications beyond the called party's premises.

Verizon's and BellSouth's "no termination" theory could produce this absurd result in a whole range of cases where communications – often, intrastate communications – continue beyond the original called party's premises. Proponents of the "no termination" theory could contend, for example, that the Commission has no § 251(b)(5) authority over calls to "leaky" PBXs, calls to credit card verification services, calls forwarded to third party unified messaging services, calls involving two-stage dialing Feature Group A access arrangements (in which a customer makes a local call to establish a connection with a long distance carrier) and calls to "roaming" wireless customers (where the call is first routed to the wireless subscriber's carrier, which then "forwards" the call to the carrier on whose network the subscriber is roaming).

And if the Verizon/BellSouth approach raises concerns for existing categories of circuit-switched traffic, those concerns will only multiply as new services and technologies develop. VoIP services, for example, may base origination of calls on the use of a local number for calls to the VoIP provider, although the subsequent communication is often to distant end users. If the call originates with a Verizon customer and another LEC terminates the initial call to its VoIP service provider customer, then the Verizon/BellSouth theory could exclude such increasingly common communications from the scope of § 251(b)(5). Or, if a LEC terminates a call from the PSTN to a VoIP customer by means of a TDM/IP translation, the LEC will not know if another carrier will be involved in delivering the call to the VoIP customer. As the Commission has recognized, IP-enabled services are increasingly "nomadic," and a "local" call to a "roaming" VoIP customer (who has connected the VoIP device to a remote broadband line) will necessarily involve telecommunications that extend beyond the physical premises associated with the called number. Of course, these are only *foreseeable* potential consequences of the Verizon/BellSouth approach, which may also have a range of entirely unforeseeable and unintended consequences as new technologies employ links of communications in unpredictable ways that not even the participating carriers may understand and anticipate. And it seems certain that mobile, nomadic and more distributed technologies and services will only become more prevalent and that telecommunications are increasingly likely to be "forwarded" to a host of existing and new devices.

It is simply unreasonable to assume that Congress intended for § 251(b)(5) to have such a "checkerboard application," with § 251(b)(5) obligations associated with the shared delivery of calls turning on such irrelevancies as whether the particular call triggered communications beyond the called party's premises. Although there is no way to predict the full implications of the Verizon/BellSouth "no termination" theory of ISP-bound traffic, it is clear that if extended to other traffic, the theory could seriously complicate the Commission's efforts to complete comprehensive intercarrier compensation reform in a timely, efficient and administrable manner. Section 251(b)(5) provides the Commission with the broad authority to address both interstate and *intrastate* traffic that will be necessary to accomplish meaningful reform, and it would be irresponsible in the extreme for the Commission to create unsustainable, self-imposed limits on its authority to insist upon uniform compensation rules for *all* traffic. The possibility of perpetuating differing rate regulation schemes for particular categories of IP-enabled and other calls raises a host of arbitrage and competitive equity issues that the Commission should find very troubling, and the Commission should take great care to ensure that its future authority over intercarrier compensation is not constricted in debilitating ways.

But the Verizon/BellSouth "no termination" theory would not only risk numerous, arbitrary holes in the fabric of § 251(b)(5), it would do so in ways that would create a system that would be impossible to administer, creating endless resource-consuming disputes over which calls are and are not within the scope of § 251(b)(5). Thus, under the voice mail example, it could be argued that some local calls that B's LEC delivered to B would be within the scope of

§ 251(b)(5) duties (the calls that B answered), while others would not (those that were automatically forwarded to voice mail or that B programmed his phone to forward to another location). Parties could be forced to establish burdensome methods to identify and classify calls and to establish separate compensation arrangements (presumably, under state law) to cover gaps in the scope of § 251(b)(5). In this regard, it is important to understand that once a carrier has delivered a call as instructed by its customer, that carrier typically has no way of knowing if the call is then forwarded to other destinations or whether the customer may use the connection to initiate further communications. Indeed, even in the specific context of ISP-bound traffic, the Commission has acknowledged that many ISP communications involve interaction with cached data, and thus do *not*, in fact, continue beyond the ISP's premises. *See, e.g.*, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 523, 544 (8th Cir. 1998). In any given ISP-bound call, the LECs certainly have no way of knowing whether "telecommunications" continues or not. Thus, while the existence of continuing communications may be relevant to the question of interstate jurisdiction, it cannot be controlling in the context of "termination" under § 251(b)(5), because the existence of the obligation would then turn on facts that are not readily within the knowledge of the contracting parties.

Congress could not have intended, and plainly did not intend, such absurd results. For that and many other reasons, the Commission would shoulder an uncommonly high risk of reversal on appeal if it endorsed the Verizon/BellSouth "no termination" theory. As an initial matter, it bears noting that Verizon and BellSouth urge the Commission to embrace precisely the reasoning that earned the Commission a sharp vacatur and remand in *Bell Atlantic.* Indeed, the Commission made *exactly* the same argument in that case, and the court of appeals properly rejected it. The Commission argued that "although the call from the ISP to an out-of-state website is information service to the end-user, it is *telecommunications* to the ISP, and thus the *telecommunications* cannot be said to terminate at the ISP." *Bell Atlantic*, 206 F.3d at 7 (emphasis added). The court of appeals expressly rejected the argument, and held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." *Id.* The court found that the Commission "had not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation," and Verizon and BellSouth have not added any new argument in that regard that the court of appeals has not already rejected.[1]

[1] For example, the Commission relied – as Verizon does here – on cases demonstrating that, under the Commission's jurisdictional end-to-end analysis, such enhanced services do not "terminate" locally for jurisdictional purposes, but are instead interstate services. The court of appeals expressly held that these cases were "not on point." *Bell Atlantic*, 206 F.3d at 6. The court of appeals clearly understood that ISP-bound traffic involves continuing telecommunications, but the Court found that to be irrelevant to real issue: what does "termination" mean in the context of *§ 251(b)(5)*?

Moreover, no matter how the arguments in favor of a "no termination" theory were repackaged the second time around, the reality is that the theory – and its illogical and impractical consequences – simply cannot be reconciled with the relevant statutory language and precedent. Section 252(d)(2) requires reciprocal compensation arrangements for the mutual recovery of the additional costs of terminating "calls" originating on the other carrier's network. In the context of ISP-bound traffic disputes, courts have consistently held that the ISP is "clearly" the "called party," *Bell Atlantic*, 206 F.3d at 6, and the relevant "call" for purposes of § 251(b)(5) is thus the local call from the customer to the ISP. If Congress had wanted to limit the scope of reciprocal compensation to carriers that are last in a string of continuous telecommunications links (or to exclude calls whenever the terminating LEC's customers thereafter employ additional telecommunications links), it could have used language to establish such limitations, but Congress did not do so. Rather, construing the § 251(b)(5) reciprocal compensation duty to apply broadly to calls made by a LEC's customer and delivered to the called party on another carrier's network (and vice versa) is the only interpretation that is consistent with the purpose and language of the two relevant statutory provisions: Section 251(b)(5)'s command that each LEC has a duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications" and Section 252(d)(2)'s instruction that it is "the transport and termination on each carrier's network facilities of *calls* that originate on the network facilities of the other carrier" that is relevant. This construction, unlike the Verizon/BellSouth approach, meets Congress' objective of efficient cost-sharing among carriers that share in the delivery of calls exchanged between customers on different, interconnected networks, and does not create arbitrary exceptions according to what further or additional routing customers may undertake for those calls, through "leaky" PBXs, forwarding of calls, or myriad other arrangements.[2]

In this regard, the Commission has, in other contexts, already recognized that where a call "terminates" does not reflexively turn on continuous paths of telecommunications. For example, in the context of CALEA, the Commission held that "common practice as well as the industry's own technical standards suggest a broader definition [of termination] that recognizes that a call can 'terminate' when it reaches an identifiable stopping point in the network." *Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd. 6896, ¶ 42 (2002). The Commission held that "there can be multiple terminations within a single call." *Id.* ¶ 44. Indeed, the Commission found that even traditional interexchange calls can involve two "terminations" for CALEA purposes – one at the IXC, and a second one at the ultimate called party.[3]

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[2] Certain calls that are otherwise within the broad scope of § 251(b)(5) are, of course, currently subject to pre-1996 Act regulations pursuant to the "grandfathering" provisions of § 251(g) and will remain so until the Commission, as § 251(g) contemplates, supercedes those pre-1996 Act regulations.

[3] *Id.* ¶ 45 n.89 ("[w]here a calling party dials the access number of an interexchange carrier and

The Commission's own, prior consistent construction of §§ 251(b)(5) and 252(d)(2) likewise forecloses the Verizon/BellSouth "no termination" approach. The Commission's longstanding rule interpreting the statutory term "termination" unquestionably identifies delivery of a call to an ISP as termination of the ISP-bound call for purposes of § 251(b)(5). That rule defines "termination" for reciprocal compensation purposes as the "delivery of that traffic from [the terminating carrier's] switch to the called party's premises." 47 C.F.R. § 51.701(d). The D.C. Circuit has already recognized that "ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP, which is *clearly* the 'called party.'" *Bell Atlantic*, 206 F.3d at 6 (emphasis added). Numerous courts have agreed that the ISP is properly considered the "called party."[4] The Commission would face an extremely uphill battle if it attempted to repudiate these decisions at this late date, particularly given that the Commission's rule defining "termination" has been upheld, *see Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1241-42 (9th Cir. 1999), and that the Commission has consistently relied upon it, even after the last D.C. Circuit remand. *See*, *e.g., Cost-Based Terminating Compensation for CMRS Providers*, 18 FCC Rcd. 18441 (2003). Furthermore, any attempt to revise the existing rule in this proceeding would raise substantial notice and comment issues.[5]

Verizon and BellSouth contend that the Commission can disregard these problems with the "no termination" theory simply by recognizing that telecommunications continue to "distant websites" and that ISP-bound traffic therefore "involve[s] continuous interstate telecommunications." Supplemental White Paper at 4-5. But that is the very theory that was rejected in *Bell Atlantic*, and the Commission decisions establishing that ISP-bound communications do not terminate at the ISP's premises for *jurisdictional* purposes that Verizon cites now are the same decisions the Commission unsuccessfully relied upon in *Bell Atlantic*.

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connects through that interexchange carrier to reach a called party ("A" to "X" to "B," where "X" is the interexchange carrier), there are two terminations – first at X (a call-receiving party) and then again at B (the called party). If B then calls a third party ("C") to establish a three-way call, then C is also a termination").

[4] *See*, *e.g.*, *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n of Texas*, 208 F.3d 475, 485-88 (5th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Oklahoma*, 235 F.3d 493, 499 (10th Cir. 2000); *see also Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566, 573-74 (7th Cir. 1999); *Starpower Communications LLC* v. *FCC*, 334 F.3d 1150 (D.C. Cir. 2003); *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1999) ("the score at the moment is 25-0 against . . . [the] Baby Bells").

[5] *See, e.g., Air Transport Ass'n of America* v. *FAA*, 291 F.3d 49, 56 (D.C. Cir. 2002) ("APA rulemaking is required if an interpretation adopts a new position inconsistent with existing regulations" (citation omitted)); *Sprint Corp.* v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003); *National Family Planning and Reproductive Health Ass'n* v. *Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992).

The D.C. Circuit has already held that the Commission's jurisdictional rulings based on links of communications do *not* provide an answer to where a call "terminates" for purposes of § 251(b)(5). As the D.C. Circuit noted, "an ISP appears . . . no different from many businesses, such as 'pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies,' which use a variety of communication services" that may extend beyond their premises, 206 F.3d at 7. The Court of Appeals noted that although "the ISP's origination of telecommunication is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service)," this does "not imply that the original communication does not 'terminate' at the ISP." *Id.* Again, "termination" for purposes of § 251(b)(5) need not follow mechanically from jurisdictional analysis, never has done so, and could not rationally do so. Indeed, the ESP exemption – applicable to ISP-bound traffic calls – is flatly inconsistent with a rule that compensation follows jurisdiction. *Cf.* Supplemental White Paper at 7; *see also Bell Atlantic*, 206 F.3d at 8 ("[t]his classification of ESPs is something of an embarrassment to the Commission's present ruling" that 251(b)(5) compensation must follow jurisdiction).

In short, the "no termination" theory of ISP-bound traffic is neither a sustainable resolution of the ISP-bound traffic remand proceeding nor a sensible short-term fix in light of the Commission's broader responsibilities and institutional interests in completing comprehensive intercarrier compensation reform.

Respectfully submitted,

/s/ David L. Lawson

David L. Lawson
Counsel for AT&T Corp.

cc: Austin Schlick
Jeff Dygert
Chris Killion
Tamara Preiss
Rob Tanner
Steve Morris
Victoria Schlesinger
Christopher Libertelli
Dan Gonzalez
Scott Bergmann
Jessica Rosenworcel
Matt Brill